

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NOS. OS 2008-0038

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY JON CALDARA REGARDING
ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY COLORADANS
FOR MIDDLE CLASS RELIEF.**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon a complaint by Jon Caldara that Coloradans for Middle Class Relief (CMCR) violated Secretary of State regulations by failing to disclose in its registration form all the issues it was opposing.

The Secretary of State received Caldara's complaint on October 30, 2008. Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary forwarded the complaint to the Office of Administrative Courts (OAC) the same day. Hearing upon the complaint was held at the OAC November 12, 2008. Mark G. Grueskin, Esq., Isaacson Rosenbaum P.C., represented defendant CMCR. Mr. Caldara represented himself.

Issue

CMCR is an issue committee that opposed amendment 47. Amendment 47 was a state-wide ballot issue proposing to amend the Colorado constitution. In pursuit of its stated purpose, CMCR paid for and distributed campaign literature opposing amendment 47. Each piece of literature indicated it was "paid for by Coloradans for Middle Class Relief" and, among other things, bore CMCR's logo "Protect Colorado – NO 47." Two of the campaign flyers produced and paid for by CMCR also mentioned amendments 49 and 54, two other state-wide ballot issues proposing amendments to the Colorado constitution. Both pieces of literature contained one or more admonitions to "Vote NO" on 49 and 54. CMCR also ran a radio advertisement that asked voters to vote no on 47, 49 and 54. Caldara, a proponent of amendment 49, complains that CMCR violated Secretary of State Rules 2.5 and 3.1 by opposing 49 and 54 without disclosing its opposition to those issues on its Secretary of State registration form.

CMCR responds that its primary purpose was to oppose 47, and the very limited reference to amendments 49 and 54 in its advertising was merely incidental to its anti-47 campaign. Because opposition to 49 and 54 was not its primary purpose, it was not required to declare that purpose on its registration form.

For the reasons explained below, the ALJ concludes that CMCR did not have a major purpose of opposing amendments 47 and 54, and spent no money to do so. It was therefore not an issue committee with respect to those amendments and thus not

obligated to disclose those issues on its registration form.

Findings of Fact

1. CMCR is an issue committee registered as such with the Colorado Secretary of State.

2. CMCR's purpose, as reflected on its Secretary of State registration form, was to oppose amendment 47.

3. Amendment 47, titled "Prohibition on Mandatory Labor Union Membership and Dues," was a state-wide ballot issue proposing to amend the Colorado constitution to prohibit the practice of requiring an employee to join and pay dues or fees to a labor union as a condition of employment.¹

4. During the months leading up to the November 2008 election, CMCR paid for and distributed a number of pieces of campaign literature opposing amendment 47. Examples include two flyers (Exhibits C and D) that exclusively referenced amendment 47.

5. In addition, CMCR paid for and distributed two flyers that primarily referenced amendment 47, but also made reference to amendments 49 and 54.

6. Amendments 49 and 54, titled "Allowable Government Paycheck Deductions" and "Campaign Contributions from Certain Government Contractors," respectively, each proposed additional amendments to the Colorado constitution.

7. These last two flyers are further described as follows:

A. Exhibit 1: An 8 1/2 by 11 inch, two-sided, color flyer that on one side contains CMCR's logo, "Protect Colorado – NO 47," along with a statement to the effect that amendment 47 was "risky," "reckless," and "wrong." The other side of the flyer contained a list of mayors, businesses and unions with the caption, "Leaders you trust agree: Say NO to 47, 49 & 54 to keep us Uniquely Colorado." This side of the flyer also quoted Denver Mayor John Hickenlooper as saying, "Amendments 47, 49 and 54 have NO economic benefit for Colorado in terms of job growth and could actually hurt our ability to recover from the current economic problems by depressing wages and pitting businesses against workers." At the bottom, in large red letters, the flyer stated, "VOTE NO 47•49•54."

B. Exhibit 2: An 8 1/2 by 11 inch four page color brochure that, on the first, second, and fourth pages made reference only to amendment 47. On page three, in addition to a prominent "NO on #47" and a large version of CMCR's "NO 47" logo, the flyer included an attribution to the Rocky Mountain News that read "Business & Labor AGREE – NO on 47, 49 & 54!"² This was the only reference

¹ The ALJ takes judicial notice of the title and summary from the 2008 State Ballot Information Booklet (Bluebook) at www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/2008Bluebookmainpage.htm.

² Caldara argues that this attribution was misleading in that it suggested the Rocky Mountain News was opposed to 49, when in fact it had endorsed it. Regardless of the merit of the argument, it is not relevant

to 49 and 54 in the entire brochure.

8. All four flyers bore a statement that the advertising was “Paid for by Coloradans for Middle Class Relief.”

9. In addition to these four flyers, CMCR paid for yard signs, newspaper ads, radio and television ads, bumper stickers, buttons and other items. Of these, only a single radio ad made any mention of amendments 49 and 54. The precise content of that radio ad was not disclosed at the hearing.

10. Although CMCR spent money to produce its anti-47 advertising, it spent no additional money to include the references to 49 and 54 in the two pieces of literature or the single radio ad.

11. CMCR met with editorial boards of several Colorado newspapers to solicit their opposition to amendment 47. CMCR did not ask these boards to oppose amendments 49 or 54.

12. CMCR’s staff contacted voters to urge a no-vote on amendment 47, but did not solicit no-votes on amendments 49 or 54.

13. Jon Caldara is a proponent of amendment 49. Early in the campaign season, he checked the Secretary of State’s records of registered issue committees to assess the degree of opposition registered to oppose his amendment. CMCR was not registered to oppose amendment 49. Caldara was therefore surprised when he later discovered that CMCR was distributing literature opposing not only amendment 47 but also 49 and 54.

14. Caldara filed his complaint on October 30, 2008.

15. On October 31, 2008, CMCR amended its Secretary of State registration form to include opposition to amendments 49 and 54, as well as 47.

Discussion and Conclusions of Law

Colorado’s campaign finance laws

The primary campaign finance law in Colorado is Article XXVIII of the Colorado Constitution, which was approved by the people of Colorado in 2002. Article XXVIII imposes contribution limits, encourages voluntary spending limits, imposes reporting and disclosure requirements, and vests enforcement authority in the Secretary of State. Colorado also has statutory campaign finance law, known as the Fair Campaign Practices Act (FCPA), §§ 1-45-101 to 118, C.R.S., which was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again substantially revised by initiative in 2002 as the result of the adoption of Article XXVIII. The Secretary of State, pursuant to regulations published at 8 CCR 1505-6, further regulates campaign finance practices.

because the issue before the ALJ is whether CMCR violated its disclosure obligation, not whether it published misleading advertising.

Issue committees are obligated to declare their purpose

The FCPA requires issue committees that support or oppose state-wide ballot issues to register with the Secretary of State, and to include in that registration a statement of the committee's "purpose or nature of interest." Section 1-45-108(3)(e), C.R.S. Secretary of State Rule 2.5, in turn, allows an issue committee to support or oppose more than one issue without filing multiple registrations, provided that:

the specific issues are included on the committee registration form at such time as an issue meets the provisions of Rule 1.6; no generic phraseology may be used once such an issue is known (i.e.: Support or oppose issues affecting the basic rights of cattle); and the registration form states whether the committee will be supporting or opposing said issues. [Article XXVIII, Section 2(10)(a)(I) and (2)(10)(a)(II)].

Rule 3.1 requires that "Whenever any of the information disclosed on the committee registration form changes, the change must be reported within five days by filling an amended registration form."

Caldara argues that CMCR violated these provisions by failing to amend the purpose statement of its registration form within five days of the date it published the campaign advertisements that opposed amendments 49 and 54. To assess the merit of that argument, the ALJ must first decide whether CMCR is an issue committee with respect to amendments 49 and 54.

Issue committee defined

An issue committee is defined by Colo. Const. art. XXVIII, § 2(10)(a), to mean:

any person, other than a natural person, or any group of two or more or more persons, including natural persons:

- (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or
- (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

This definition appears to include groups that have *either* a "major purpose" of supporting or opposing an issue, *or* have accepted, spent or contributed more than \$200 to support or oppose an issue. Secretary of State Rule 1.7, however, requires that *both* conditions be met before a group will be considered to be an issue committee. "A person or group of persons is an issue committee only if it meets *both* of the conditions in Article XXVIII, Section 2(10)(a)(I) and 2(10)(a)(II)." 8 CCR 1505-6, Rule 1.7(b)(*italics added*).³

³ "Or" may be construed as "and" when necessary to implement the plain meaning or intent of a law. *Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993).

Though not argued at the hearing, there is some question whether Rule 1.7(b) is effective to make the conditions conjunctive in light of the constitution's use of the disjunctive "or." Although courts will sometimes construe "or" to mean "and" in order to carry out the plain meaning or intent of the legislature, the word "or" is presumed to be used in the disjunctive sense unless legislative intent is clearly to the contrary. *Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993); *West v. Roberts*, 143 P.3d 1037, 1040 (Colo. 2006) ("Use of the word 'or' in a statute is presumed to be disjunctive.") It is not clear to this ALJ that either the drafters of Article XXVIII, or the voters who approved it, intended the conditions of § 2(10)(a) to be conjunctive.

In context of political committees, case law requires that a group must have a "major purpose" of influencing a candidate's election or defeat in order to be subject to regulation. *Alliance for Colorado's Families v. Gilbert*, 172 P.3d 964, 970 (Colo. 2007) ("a group is not a 'political committee' unless its 'major purpose' is to influence elections"), citing *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). The purpose of the rule is to keep campaign finance laws from casting too broad a net, ensnaring groups formed primarily for purposes other than candidate advocacy. See *Colorado Right to Life Committee*, 498 F.3d 1137, 1154 (10th Cir. 2007) (without the major purpose test, the law would "operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets.") Although no Colorado case law has specifically applied this rationale to issue committees, it seems logical that it should apply. The goal of avoiding overbroad regulation seems just as apt in one case as the other. Issue advocacy is perhaps even more deserving of protection from over-regulation given that "discussion of public issues ...[is] integral to the operation of a system of government established by our constitution." *Gilbert*, 172 P.3d at 969. Although disclosure of the "identity of supporters and opponents of a ballot initiative would be potentially helpful to the electorate ... the information is not nearly as critical as the identity of candidate supporters." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 755 (Colo. 2000).

Consistent with the rationale behind the major purpose test, it is at least arguable that the "or" of § 2(10)(a) must be construed as an "and" so that no entity will be subject to regulation as an issue committee unless it has a major purpose of opposing or supporting a ballot issue. The ALJ, however, need not decide whether the "or" is disjunctive or conjunctive because, as will be discussed below, CMCR does not meet either test with respect to amendments 49 and 54.

The major purpose test is not met

CMCR argues that its major purpose was to oppose amendment 47 not amendments 49 and 54. It says this is true because the focus of its effort was to oppose amendment 47, it spent no additional money to oppose amendments 49 and 54, and the brief references to 49 and 54 found in two of its flyers and one of its radio ads were merely incidental to its opposition to 47. Therefore, because its major purpose did not include opposing amendments 49 and 54, it was not an issue committee as to those

amendments and had no obligation to disclose them on its registration form.⁴

The ALJ agrees that CMCR did not have a major purpose of opposing amendments 49 and 54. Evidence supporting this conclusion includes:

1. CMCR's logo, "Protect Colorado – NO 47," prominently appeared on every piece of its campaign literature and made no reference to 49 or 54.

2. Of the four pieces of campaign literature offered into evidence, only two made any reference at all to amendments 49 and 54. Of those two, one mentioned 49 and 54 only once on just one of the flyer's four pages. That mention was a reference to a statement in the Rocky Mountain News that business and labor groups agreed, "NO on 47, 49 & 54." This brief reference to 49 and 54 was overshadowed by a "NO on #47" that appeared on the same page along with a large version of CMCR's "NO 47" logo.

3. Only one piece of campaign literature made any extensive reference to amendments 49 and 54. This was in the context of a statement that read "Leaders you trust agree: Say NO to 47, 49 & 54 to keep us Uniquely Colorado," followed by a list of mayors, businesses and unions that opposed all three amendments. Because these "leaders" were opposing all three amendments, it would have been factually misleading for CMCR to report that they only opposed amendment 47. The reference to 49 and 54 in this context was incidental to CMCR's primary focus, which was amendment 47.

4. In addition to these four items of campaign literature, CMCR paid for yard signs, newspaper ads, radio and television ads, bumper stickers, buttons and other items. Of these, only a single radio ad made any mention of amendments 49 and 54. Because the precise content of that radio ad was not disclosed at the hearing, the ALJ cannot conclude that, in the context of all the other advertising, it was evidence of a major purpose to oppose those two amendments.

5. CMCR spent no additional money to include the references to amendments 49 and 54 in the two pieces of literature or the single radio ad.

6. CMCR met with editorial boards of several Colorado newspapers to solicit their opposition to amendment 47. CMCR did not ask these boards to oppose 49 or 54.

7. CMCR's staff contacted voters to urge a "no-vote" on amendment 47, but did not solicit no-votes on 49 or 54.

Hearings involving alleged violations of the fair campaign practices laws are conducted under the provisions of the Administrative Procedure Act (APA), § 24-4-105, C.R.S. Colo. Const. art. XXVIII, § 9(1)(f). Section 24-4-105(7) of the APA places the

⁴ CMCR says it amended its registration form on October 31st to add reference to 49 and 54 only in an exercise of caution to limit potential liability in case the ALJ ruled against it. The amendment of its registration was not intended as an admission of liability.

burden of proof upon the “proponent of an order.” As the proponent of an order finding CMCR in violation of the law, Caldara bears the burden of proof.

Considering the evidence as a whole, Caldara has not sustained the burden of proving that CMCR had a major purpose of opposing amendments 49 and 54.

CMCR did not accept, contribute or expend more than \$200 opposing amendments 49 and 54

As noted in Finding of Fact 10, CMCR spent no money to oppose amendments 49 and 54. Everything it spent was for the purpose of opposing amendment 47; the incidental mention of 49 and 54 in a few of its advertisements involved no additional expense. Moreover, there is no evidence whatever that CMCR accepted any contributions to oppose amendments 49 or 54, or that they made any contributions to any other entity for that purpose. Therefore, this condition has also not been met.

Can a group be an issue committee as to one issue but not another?

Finally, though not specifically raised by the parties, the question arises whether a group may be an issue committee as to one issue but not another. That is to say, if a group is an issue committee as to one issue, must it disclose every other issue it supports or opposes even though not a major purpose and no money is accepted or spent to do so?

The ALJ believes not. This conclusion is consistent with the language of § 2(10)(a), which defines an issue committee in terms of its major purpose and the amount of money spent. Logically, if a group does not have a major purpose of opposing or supporting a given issue and has spent no money to do so, it should not be burdened by regulation as to that issue. To the extent the law leaves any ambiguity in this regard, the balance must be struck in favor of the defendant. “When the First Amendment is implicated, the tie goes to the speaker, not the censor.” *Federal Election Commission v. Wisconsin Right to Life, Inc.*, ___ U.S. ___, 127 S.Ct. 2652, 2669, 168 L.Ed.2d 329 (2007).⁵

Summary

In the absence of proof that CMCR had a major purpose of opposing amendments 49 and 54, it was not obligated to disclose those issues on its Secretary of State registration form. Therefore it did not violate Rules 2.5 and 3.1.

Agency Decision

Coloradans for Middle Class Relief did not violate Secretary of State Rules 2.6

⁵ It might be argued that this narrow construction encourages evasion of the disclosure laws, however that is a problem that cannot be fixed by judicial fiat. *Common Sense Alliance v. Davidson*, 995 P.2d 748, 755 (Colo. 2000)(while a loophole in the FCPA may be troubling, “it is a statutory problem that cannot be amended by judicial fiat.”)

and 3.1, and therefore the complaint is dismissed.

Done and Signed

November 21, 2008

ROBERT N. SPENCER
Administrative Law Judge

Digitally recorded CR #2

Exhibits admitted:

Complainant's exhibits: 1, 2

Defendant's exhibits: A - E

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

William Hobbs
Secretary of State's Office
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on this ____ day of November 2008.

Court Clerk